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BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 92-90

Dear Ms. Searcy:

Enclosed please find for filing in the above-captioned proceeding an original and four copies of CUC International Inc.'s Comments.

Please call me should you have any questions.

Very truly yours,

Diane S Killory
Diane S. Killory
Attorney for CUC
International Inc.

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

Federal Communications Commission
Office of the Secretary

In the Matter of

The Telephone Consumer Protection
Act of 1991

CC Docket No.
92-90

COMMENTS OF CUC INTERNATIONAL INC.

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May 26, 1992

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SUMMARY

CUC International Inc. ("CUC") urges the Commission, in adopting regulations pursuant to the Telephone Consumer Protection Act of 1991, to balance carefully consumers' privacy interests against the legitimate business efforts of companies -- such as CUC -- that market goods and services over the telephone. In addition, the Commission should adopt a regulatory scheme that does not foreclose to consumers who wish to make purchases over the telephone the opportunity to do so.

CUC is an American company that markets enhancement services to the holders of credit cards of major financial institutions, retailers and oil companies. Because CUC does not use prerecorded messages to market by telephone, these Comments focus on live solicitations.

CUC urges the Commission not to restrict live operator solicitations beyond requiring companies to establish and maintain a company-specific do-not-call list. Because live operator calls are not as intrusive as prerecorded calls, they should not be subject to the prohibitions Congress has placed on the latter type of call. A company-specific do-not-call list would most effectively protect the privacy of consumers who no longer wish to be called by a company, without restricting the purchasing opportunities of other consumers. A company-specific do-

not-call list would also permit consumers to continue receiving calls from some companies but not others. Broader do-not-call lists (industry-wide or national) would not permit consumers to make these differentiations. They would also be more costly, would be more difficult to administer, and would raise privacy concerns.

While it is CUC's firm belief that there is no justification for the Commission to adopt regulations for live operator calls beyond requiring a company-specific do-not-call list, if the Commission should adopt more restrictive regulations, it should, at a minimum, adopt exemptions that are at least as broad as those proposed for prerecorded messages. Specifically, the Commission should clarify (as with prerecorded messages) that the established business relationship exemption covers a call by, or on behalf of, a caller who has a prior or current business relationship with the called party. From the consumer's perspective, it makes no difference whether or not a representative who calls for an institution is an in-house employee. Accordingly, there would be no reasonable basis for adopting different regulatory schemes based on whether the individual placing the call is an in-house employee.

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Federal Communications Commission
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The Telephone Consumer Protection)
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To: The Commission

COMMENTS OF CUC INTERNATIONAL INC.

As a company that markets goods and services by telephone, CUC International Inc. ("CUC") welcomes the opportunity to submit, by its attorneys, these Comments in the above-captioned proceeding.

INTRODUCTION

CUC is an American company (headquartered in Stamford, Connecticut) that markets enhancement services to the holders of credit cards of major financial institutions, retailers and oil companies. The issuers of those credit cards use CUC's marketing services as a means of enhancing the value of their cards by building goodwill among their customers (by offering them these extra services) and generating additional fee-based revenues.

CUC markets, for example, to the holders of Citibank credit cards such enhancement services as a shopping program (offered under the name "CitiShopper") that gives program members access to over 250,000 brand-name items at 10 to 50 percent off the manufacturer's list price with a lowest price guarantee. CUC also markets to credit card customers of Citibank (and other banks) programs that offer dining discounts and lowest price travel fares. In addition, CUC markets to credit card holders of clients such as Bank of America a credit card registration and protection service. And it markets to credit card holders of clients such as Sears an AutoVantage® program that provides referrals and price information to members in purchasing and maintaining their automobiles.

CUC jointly markets these programs with the client institution issuing the credit card, in the institution's name. When a CUC representative contacts Citibank's customers, for example, the representative clearly states that he or she is calling on behalf of Citibank. CUC's authority to contact the bank's customers is, moreover, program specific. If, for example, CUC has the authority to market its shopping service to Citibank customers, it cannot also market the AutoVantage® program to those customers without first obtaining explicit approval from Citibank to do so. The terms and conditions of the contacts are agreed

upon between CUC and Citibank (and each other client institution). The subsequent calls to customers are carefully scripted and CUC's representatives are instructed not to deviate from the scripts.

The goal is to offer the client institution's credit card customers enhancement products or services that they may be interested in purchasing. The goal is never to annoy the client institution's customers, but rather to augment the relationship between the client and its credit card members. To this end, new services or programs are carefully screened to determine if they would likely be of interest to existing customers. CUC strives for the highest quality in each program it offers. And, as discussed below, customers who express a disinclination to be called again are placed on a do-not-call list.

One of CUC's primary methods of informing credit card holders of its services is by telephone. More than two million of the potential customers called purchase one or more of CUC's services, generating approximately \$250 million in revenues a year. Once potential customers become members, they purchase trips and merchandise worth over \$400 million per year.

CUC's efforts are indicative of both the extent to which many companies rely on telemarketing to sell products or services, as a means of enhancing their relationship with

existing customers, and the extent to which customers make purchases by telephone. Millions of Americans place orders each year in response to telemarketing efforts, demonstrating that many consumers welcome the opportunity to make purchases in response to telephone solicitations. As Congress noted in the preamble to the Telephone Consumer Protection Act of 1991 (the "Act"),¹ United States sales generated through telemarketing have increased more than four-fold since 1984 to a total of \$435 billion in 1990.² Without question, telemarketing plays a major role in the national economy.

CUC files these comments to share with the Commission its own experiences as a company striving for quality and consumer-friendliness. In addition, CUC takes this opportunity to impress upon the Commission the need for a regulatory scheme that, while implementing the Act, does not unnecessarily impede the public's ability to continue purchasing goods and services offered by telephone or the business endeavors of the companies who market those services. Impeding either of these would be inimical to the public interest. Indeed, President Bush indicated that he would have vetoed the Act except that it "gives the

1 Telephone Consumer Protection Act § 2, Pub. L. No. 102-243, 1991 U.S.C.C.A.N. (105 Stat.) 2394, 2394-95 [hereinafter Telephone Consumer Protection Act].

2 Id.

[Commission] ample authority to preserve legitimate business practices."³ He urged the Commission to "use those authorities to ensure that the requirements of the Act are met at the least possible cost to the economy."⁴ CUC shares these concerns.

**I. THE COMMISSION SHOULD NOT RESTRICT LIVE
OPERATOR SOLICITATIONS BEYOND REQUIRING A
COMPANY-SPECIFIC DO-NOT-CALL LIST**

Because CUC does not use prerecorded messages, we focus these Comments on live solicitations.⁵ Live solicitations do not invade consumers' privacy in the way that automated or prerecorded messages may. Consequently, there is no need for the Commission to extend to live solicitations the prohibitions the Act imposes on automated or

³ Statement By President George Bush On Signing S. 1462, Dec. 20, 1991, reprinted in 1991 U.S.C.C.A.N. 1979.

⁴ Id.

⁵ Whether a live operator call is placed by use of an autodialer or an operator's fingers should be irrelevant to the Commission's analysis here. The only relevant factor from the customers' perspective is whether a live operator or a prerecorded message is on the other end of the line. Although proposed Rule 64.1100 correctly limits the scope of its prohibitions to telephone calls using "an artificial or prerecorded voice" to deliver a message, the Commission in the text of its Notice of Proposed Rulemaking appears to refer to autodialers and prerecorded messages interchangeably. See Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Notice of Proposed Rulemaking, released April 17, 1992 at ¶ 9 [hereinafter NPRM]. Autodialers can, however, also be used to dial residential customers for live operator calls -- and there is no basis for limiting the use of this technological aid in placing (Footnote 5 Continued)

prerecorded messages. Rather, the Commission should regulate live operator calls only to the extent of adopting a company-specific do-not-call list requirement.

A. Live Operator Calls Are Not As Intrusive As Automated or Prerecorded Calls

As the Commission correctly notes, the legislative history of the Act reflects the premise that prerecorded messages are more intrusive to consumers' privacy than live solicitations.⁶ The Report of the Senate Committee on Commerce, Science, and Transportation of the Senate bill which preceded the Act states that

[I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by "live" persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or a voice recording service, and do not disconnect the line even after the customer hangs up the telephone. For all these reasons, it is legitimate and consistent with the Constitution to impose greater restriction on automated calls than on calls placed by "live" persons.⁷

(Footnote 5 Continued)
such calls. In light of the confusing text in the NPRM, the Commission should clarify in its decision that Rule 64.1100 does not apply to live operator solicitations.

6 NPRM at ¶ 25.

7 S. Rep. No. 102-178, 102nd Cong., 1st Sess. 4-5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968-1978.

This view is consistent with CUC's experience. Indeed, it is precisely because CUC is sensitive to the fact that some consumers feel that their privacy is invaded by telemarketing calls that CUC uses only live operators to make its telephone presentations. In CUC's experience, an unreceptive customer feels less intruded upon, and can more easily prevent future calls, with live operators. With live operators a customer who no longer wishes to receive telephone solicitations from CUC on behalf of the client institution need only inform CUC of that desire. CUC would then take steps to ensure that that customer is no longer called by either CUC or the client on whose behalf the customer was initially contacted. (CUC's do-not-call policy is described in detail in part II below.)

The FCC's statistics likewise support the conclusion that consumers find live solicitations less intrusive. As the Commission notes, the bulk of telephone solicitation complaints received by the FCC pertain to prerecorded messages.⁸ Indeed, the Commission receives ten times as many complaints pertaining to prerecorded messages as it does complaints pertaining to live calls.⁹ There is no basis, therefore, for imposing upon live solicitations the

8 NPRM at ¶ 23.

9 Id. at ¶ 24.

restrictions contained in the Act regarding automated or prerecorded solicitations.

B. A Company-Specific Do-Not-Call List Requirement Would Effectively Protect Consumers' Privacy Interests While Allowing Desired Solicitations

A company-specific do-not-call list requirement would allow those customers who no longer wish to receive the calls of a particular company to so inform that company, which in turn would place the customer on a do-not-call list. Henceforth, no further calls could be made by that company to that customer for a specified period of time.¹⁰ Such a requirement would strike the appropriate balance between sufficiently protecting consumers' privacy interests while allowing companies to reach consumers who wish to take advantage of telemarketed goods and services.

As noted above, large numbers of consumers welcome and take advantage of telephone solicitations. The Commission should affirm its tentative conclusion that in light of the large number of people who take advantage of telemarketing

¹⁰ If the Commission adopts a do-not-call list requirement, it should recognize that it takes a certain period of time (generally four weeks for a company-specific list) to process a customer's request. Thus, although it is reasonable to require calls to a customer to cease once the request is processed and the customer is included on the do-not-call list, it would be unreasonable to penalize the company for calls that are made before the request has been processed.

efforts, it would be inimical to the public interest to deny consumers the option of purchasing items via the telephone.

The Commission should therefore refrain from restricting live solicitations beyond requiring each company that engages in telemarketing to implement a do-not-call list. Such a requirement would allow consumers who wish to take advantage of telemarketing offers to receive solicitations, either from all companies or from only certain ones, depending on the consumer's preferences.

A do-not-call list that is a broader than company-specific would not give consumers this flexibility. A national data base would force consumers to choose either to receive all telephone solicitations or none. Once a consumer's name goes into such a data base, that consumer would no longer receive telephone solicitations from any company. Thus, a national data base would be completely ill-suited for consumers who wish to continue receiving telephone solicitations from some companies but not others.

An industry-wide list would suffer many of the same overbreadth problems. A consumer might be perfectly happy to receive calls from some companies but not others. An industry-wide list would prevent a consumer from making these differentiations.

In addition, the broader the data base, the longer it will take to add a consumer's name to (or remove it from) a

do-not-call list. As the Commission notes, the lag time for a national data base may be several months.¹¹ A company-specific list, by contrast, could be processed in a matter of weeks rather than months, given the more manageable size of the list.

**C. Only A Company-Specific Do-Not-Call List
Would Not Unduly Burden Businesses**

The Commission's laudable policy of enhancing rather than impeding business endeavors¹² militates against the adoption of a do-not-call list that is any broader than company-specific. Any broader do-not-call list would essentially penalize companies for tactics of a single company that some consumers may consider overly intrusive or zealous.

As noted above, for example, CUC and the client institutions on whose behalf it calls are extremely careful not to harass or offend the customers called. Unfortunately, not all companies are so vigilant. An industry-wide or national do-not-call list would thus have the overbroad (and unfair) effect of sweeping in companies like CUC if a single

¹¹ NPRM at ¶ 28.

¹² See, e.g., Statement of FCC Chairman Alfred C. Sikes, "FCC Regulatory Reform Initiatives" (March 12, 1992) (transcript available at the FCC) (quoting President Bush's call, in announcing a moratorium on federal regulations, for agencies to "weed out unnecessary and burdensome regulations, which impose needless costs on consumers and substantially impede economic growth").

company in the same industry or anywhere in the country used overly aggressive techniques that triggered a customer's do-not-call request. A company-specific do-not-call list would be properly limited in scope to the company on whose behalf the offending caller telephoned.

**D. Only A Company-Specific Do-Not-Call List
Would Avoid Confidentiality Problems**

Another important advantage of a company-specific do-not-call list is that it would protect the confidentiality of consumers' names, telephone numbers and other information the consumer may be required to provide if the do-not-call list is to be effective.¹³ A consumer who asks to be put on a company-specific do-not-call list is at least certain that the list would not be viewed by other companies across the country or which compete in the same industry. By contrast, a national data base would presumably be accessible to any entity. And an industry-wide list would be accessible to the company's direct competitors.

¹³ Indeed, as a do-not-call list expands beyond a specific company, additional information will likely be required to implement the list -- including such information as a consumer's social security number or address. As a result, consumers who are concerned about the lack of confidentiality provided by a national or industry-wide data base may be more hesitant to place their names on these lists, thereby rendering the lists substantially less effective.

In addition to these privacy concerns, industry-wide or nationwide do-not-call lists could in practice generate more telephone calls to consumers who place themselves on industry-wide or nationwide do-not-call lists. Presumably, organizations that are exempt from the Act's restrictions, i.e. tax exempt organizations,¹⁴ would have access to the lists and could obtain telephone numbers that they could use for telemarketing purposes. Consequently, and ironically, a national or industry-wide data base could result in consumers who list their numbers actually receiving more telephone calls. Because such an effect would clearly be both unintended and undesirable, adoption of a national or industry-wide data base would not constitute reasoned decisionmaking by the Commission.

**E. A Company-Specific List Would Avoid
 Imposing Unnecessary Costs On The
 Public**

By requiring a company-specific do-not-call list, the Commission would minimize the costs associated with a do-not-call requirement. The Commission has appropriately recognized that the costs associated with establishing and operating a national data base could be substantial and

¹⁴ See Telephone Consumer Protection Act § 227(a)(3)(C), 1991 U.S.C.C.A.N. 105 Stat. at 2395.

that, in these times of fiscal restraints, they should not be passed on to taxpayers.¹⁵

A company-specific do-not-call list would not raise such funding problems. The costs would be considerably less, as each company would need to worry only about its own customers and would not have to coordinate its list with those of other companies. Moreover, each company would be responsible for the cost of establishing and maintaining its own list.

II. A COMPANY-SPECIFIC DO-NOT-CALL LIST REQUIREMENT IS EMINENTLY FEASIBLE

CUC's current do-not-call policy demonstrates that a company-specific do-not-call list requirement is workable and can be readily and effectively implemented.

When a customer who has been contacted by a CUC representative on behalf of a client says that he or she does not want to be contacted again, the customer's name and telephone number are forwarded to CUC's data processing center, where they are added to a do-not-call list. The list of new names and numbers is also regularly forwarded to CUC's client, so that the client institution can update its do-not-call list as well.

¹⁵ NPRM at ¶ 29.

In order to ease the Commission's enforcement responsibilities, CUC proposes that the Commission create a presumption that if a company utilizes a do-not-call list, the company is in compliance with the Act. In addition, the Commission should make it clear that companies such as CUC, which market on behalf of other companies (and represent themselves as such), are only prohibited from calling a customer on behalf of the company on whose do-not-call list the consumer has requested to be placed.

If, for example, a CUC representative called Citibank customer Jane Doe to offer her the "CitiShopper" service, and Jane Doe asked not to be called again, CUC would be prohibited from calling Jane Doe again on behalf of Citibank (regardless of whether the service being offered was "CitiShopper" or another service). In addition, because CUC was calling on behalf of Citibank, CUC would (and should) be required to inform Citibank that Jane Doe should be added to Citibank's do-not-call list. CUC should not, however, be prohibited from calling Jane Doe on behalf of an entirely different client institution such as J.C. Penney, unless Jane Doe has also asked not to be called by J.C. Penney.

**III. IF THE COMMISSION SHOULD DECIDE TO
RESTRICT LIVE OPERATOR SOLICITATIONS
BEYOND REQUIRING A DO-NOT-CALL LIST, IT
SHOULD ADOPT THE SAME EXEMPTIONS IT HAS
PROPOSED FOR PRERECORDED SOLICITATIONS**

It is CUC's firm belief that the Commission should not adopt regulations for live operator calls beyond requiring company-specific do-not-call lists. If the Commission nevertheless decides to apply additional restrictions to live operator solicitations, it should, at a minimum, adopt exemptions to those restrictions that are at least as broad as those for prerecorded messages.

Specifically, while the Act exempts from the term "telephone solicitation" calls to a "person with whom the caller has an established business relationship,"¹⁶ the Commission has the discretion to adopt regulations implementing and clarifying this exemption.¹⁷ To be consistent with the exemption proposed for prerecorded messages, the Commission should clarify that the established business relationship exemption covers a call "by, or on behalf of, a caller . . . to any person with whom the caller has had a prior or current business relationship at the time the call is made."¹⁸

16 Telephone Consumer Protection Act § 227(a)(3)(B), 1991 U.S.C.C.A.N., 105 Stat. at 2395.

17 See id. § 227(c)(1)(E) at 2397.

18 NPRM Proposed Section 64.1100(c)(3), Appendix B at 2.

In addition to providing congruity between prerecorded and live operator calls, defining the established business relationship exemption to include calls made on behalf of a caller is logical. From the consumer's perspective, it makes no difference whether or not a representative who calls for an institution is an in-house employee. What matters to the consumer is that the caller is calling for the institution with which the consumer has a relationship. Accordingly, there would be no reasonable basis for adopting different regulatory schemes based on whether the individual placing the call is an in-house employee.

CONCLUSION

For the reasons set forth above, CUC urges the Commission, in adopting rules governing live telephone solicitations, to adopt only a company-specific do-not-call list requirement.

Respectfully submitted,

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